

Privy Council Appeal No. 7 of 1944
Oudh Appeal No. 16 of 1942.

Kunwar Rajendra Bahadur Singh - - - - *Appellant*

v.

The Honourable Mr. Justice Kunwar Dalip Singh - *Respondent*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 19TH MARCH, 1945

Present at the Hearing :

LORD THANKERTON

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree dated 13th April, 1942, of the Chief Court of Oudh at Lucknow, which modified a judgment and decree dated 25th May, 1938, as amended by a judgment and decree dated 9th May, 1940, of the Special Judge, First Grade, Barabanki, under the United Provinces Encumbered Estates Act, 1934 (hereinafter referred to as "the 1934 Act"). The questions raised in the appeal relate to the construction and effect of the 1934 Act as amended by the United Provinces Encumbered Estates Amendment Act, 1939 (hereinafter called "the 1939 Act").

The facts giving rise to the appeal are not in dispute.

On the 23rd January, 1912, Raja Raghuraj Bahadur Singh borrowed Rs. 5,00,000 from Raja Sir Harnam Singh, carrying interest compoundable half-yearly on the terms of a mortgage deed. On the 20th October, 1915, Raja Raghuraj Bahadur Singh executed a fresh mortgage (hereinafter referred to as "the mortgage of 1915") in favour of Raja Sir Harnam Singh, in substitution for the mortgage of 1912 for securing Rs. 5,71,490.13.9 carrying interest at 6 per cent. per annum payable on the 30th June and 31st December in each year, with a provision that if any half-yearly instalment of interest was not paid on the due date it should be added to principal and carry interest at the rate of 6 per cent. per annum. The rate of interest was subsequently raised, but nothing turns upon this. On the 8th January, 1926, Raja Sir Harnam Singh obtained a preliminary decree on the mortgage of 1915 which decree was made final on the 26th February, 1927. In the year 1925, the mortgagor having died, his sons divided the estate and liabilities between themselves. One of the brothers paid off his share of the mortgage debt under the mortgage of 1915, and on the 17th October, 1929, the other son, namely the appellant, Kunwar Rajendra Bahadur Singh, executed a fresh mortgage (hereinafter referred to as "the mortgage of 1929") in favour of Raja Sir Harnam Singh to secure the appellant's share of the mortgage debt amounting to Rs. 7,60,108.11.9. Interest was to be payable at the rate of 7 per cent. per annum and there was a provision for capitalising interest in arrear similar to that in the mortgage of 1915. In February, 1935, a decree for sale was made of the property comprised in the last mentioned mortgage.

In April, 1935, the Act of 1934 came into operation. By section 4, the right is given to any landlord who, or whose immovable property, is encumbered by private debts, to make an application to the Collector of the District requesting that the provisions of the Act be applied to him. The Collector is required to forward the application to the Special Judge appointed under the Act. Section 14 provides for the hearing of the

application by the Special Judge. Sub-sections (4)(a), (5) and (6) are in the following terms:—

“(4) In examining each claim the Special Judge shall have and exercise all the powers of the Court in which a suit for the recovery of money due would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them, subject to the following provisions namely:—

(a) the amount of interest held to be due on the date of application shall not exceed that portion of the principal which may still be found to be due on the date of application.

(5) For the purpose of ascertaining the principal under clause (a) of sub-section (4) the Special Judge shall treat as principal any accumulated interest which has been converted into principal at any statement or settlement of account, or by any contract made in the course of the transaction before December 31st, 1916.

(6) For the purpose of ascertaining the principal under Clause (a) of sub-section (4) the Special Judge shall not treat as principal any accumulated interest which has been converted into principal at any statement or settlement of accounts or by any contract made in the course of the transaction after December 31st, 1916.”

The effect of the Act seems to be that the Special Judge has to ascertain the principal sum due at the date of the application and, in so doing, disallow all interest capitalised, at any rate, after the 31st December, 1916. Once the principal sum has been so ascertained it follows that the balance of the amount due, so far as the whole debt consists of capital and interest, and excluding other sums, which may be due, e.g., for costs, charges and expenses, is attributable to interest, of which the amount recoverable is limited to a sum equal to the principal.

On October 30th, 1936, application under the Act was duly made and it is not contended that such application was out of time. The Special Judge determined the application on the 25th May, 1938. He held that of the amount secured by the mortgage of 1929, the principal sum comprised in the mortgage of 1915 represented principal and the balance interest. He then apportioned the principal sum between the present appellant and his brother in the proportions in which they had divided the liability under the mortgage of 1915 between them and on that basis he fixed the principal due by the appellant at Rs.3,45,291.8.9, and held that the appellant was liable for payment of that sum for principal and a further sum of the same amount for interest. He also allowed certain sums for costs and fixed the total amount for which the appellant was liable at Rs.7,02,140.8.6.

On the 29th September, 1938, the appellant presented a memorandum of appeal to the Chief Court of Oudh against this decision but, before the appeal came on for hearing, the Act of 1939 was passed on the 30th September, 1939.

That Act provided, in section 14, that in section 14 of the 1934 Act, for the words and figures “before December 31st, 1916” in sub-section (5) the words and figures “on or before December 31st, 1916” should be substituted, and an explanation was added to sub-section (5) in these terms: “Interest which on or before December 31st, 1916, became part of the principal under the express terms of the original contract shall, for the purpose of this section, be deemed to be principal”. By section 22 a new section, No. 20A, was added after section 20 of the 1934 Act which so far as material provided, that notwithstanding anything in the 1934 Act, if in the determination of any claim under the provisions of section 14 any interest had not been treated as principal solely on the ground that it was converted into principal on December 31st, 1916, or on the ground that it was converted into principal on or before December 31st, 1916, in accordance with an express term in the original contract the amount due under such claim should be re-determined in accordance with the provisions of the Act.

The reason for the insertion of the explanation to section 14, sub-section (5) of the 1934 Act would seem to have been that the Chief Court of Oudh, in the case of *Sundar Lal v. Kaniz Zohra Begum* Indian Law Reports 14, Lucknow p. 430, had decided that the contract referred to in sub-section (5) was a contract entered into after the original mortgage and did not include a provision for converting interest into principal contained in the original mortgage. This case will be considered later in this judgment.

On the 9th May, 1940, an application was made under section 20A, sub-clause 4 of the 1939 Act to re-open the decision of the Special Judge of the 25th May, 1938. The application came before another Special Judge who added to the principal sum allowed by his predecessor unpaid interest which became payable between the date of the 1915 mortgage and the 31st December, 1916, and held that the amount to which the claimant mortgagees were entitled was Rs. 7,37,715.12.6. In fixing this amount the learned Judge, apparently by inadvertence, omitted to include the costs allowed by his predecessor.

The appeal to the Chief Court against the order of the 25th May, 1936, came on for hearing on the 13th April, 1942, and was treated as an appeal both against the order of the 25th May, 1938, and the order of re-determination of the 9th May, 1940. The appeal was dismissed, and cross objections asking for the costs allowed at the first hearing and omitted by inadvertence on the re-determination were allowed. In dismissing the appeal the learned Judges of the Chief Court expressed the view that the principal sum allowed by the first Special Judge was at too low a figure. Their Lordships have felt some difficulty in following the views of the learned Judges of the Chief Court upon this point, but as there was no appeal against the amount at which the principal sum had been fixed by the Special Judge the observations were unnecessary for the determination of the appeal and need not be further considered.

On this appeal the only point which has been seriously argued is that the amendments to the 1934 Act made by the 1939 Act are ultra vires in so far as they are retrospective, by reason of the provisions of section 292 of the Government of India Act, 1935. That section provides:—"Notwithstanding the repeal by this Act of the Government of India Act, 1915, but subject to the other provisions of this Act all the law in force in British India immediately before the commencement of part 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority". The argument is that if a law be altered retrospectively it has, in effect, not continued in force until altered by a competent legislature. Their Lordships find it unnecessary to determine this question because in their view retrospective provisions of the 1939 Act have no effect on the rights of the parties to this litigation. In their Lordships' view the case of *Sundar Lal v. Kaniz Zohra Begum* (supra) is open to serious criticism. The Court in that case discussed with some precision the meaning of the word "course" in the expression "in a contract made in the course of the transaction" but they did not discuss the meaning of the word "transaction", and assumed it to refer only to the ultimate written contract. A contract for a mortgage is usually preceded by negotiations in which the amount to be advanced, rate of interest, and the nature of the security are arranged, and their Lordships think that when such negotiations result in a mortgage contract the contract can be correctly described as made in the course of the transaction. But, however that may be, in the present case the mortgage transaction unquestionably commenced in 1912 when the original mortgage was entered into for which the mortgage of 1915 was substituted. It seems to their Lordships clear that the mortgage of 1915 was a contract made in the course of the transaction within the meaning of section 14 (5) of the 1934 Act and the first Special Judge was in error in not allowing capitalised interest under the mortgage of 1915 down to and including the 31st December, 1916. It may be noticed that the Act of 1934 was silent as to interest converted into principal on the 31st December, 1916, and there was nothing in the Act to prevent effect being given to the contract between the parties as to such interest. But their Lordships agree with the Chief Court in thinking that the first Special Judge must be treated as having disallowed interest because it had been converted into principal on or before December 31st, 1916, in accordance with the express term in the original contract, and the matter was therefore rightly re-determined by the second Special Judge under section 20A of the 1939 Act.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council

KUNWAR RAJENDRA BAHADUR SINGH

v.

THE HONOURABLE MR. JUSTICE
KUNWAR DALIP SINGH

[DELIVERED BY SIR JOHN BEAUMONT]

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